

Amoral Water Markets?

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Severe water scarcity in the western United States is prompting legitimate questions about the best way to decide which places, people, industries, and species need it most. Water markets, which allow for trading water like a commodity, are perennial proposals during times of scarcity. Water markets have an innate allure: promising to efficiently reallocate water to the highest value uses, minimize risk, and preserve the environment, while relying on the invisible hand to brush aside politically painful values-based questions. This view portrays markets as an amoral arbiter of the best use of water. But water markets are not amoral; they express the historic value judgments baked into the existing western water law system, and layering market approaches over the existing system will both exacerbate the negative impacts of those values and further entrench existing law. In this Article, we show that the West is not ready for water markets.

We rely on institutional economics, environmental justice, and commons scholarship to identify three core faults of water markets. First, an institutional economics perspective removes the veil of neutrality and efficiency of markets. Markets are embedded in a political economy and physical geography that makes market failure inherent. Markets depend on legal institutions (property rights, courts, etc.) for their existence and cannot be separated from the value judgments embodied by those institutions. Ultimately, water markets do not determine values—they express them.

Second, drawing from environmental justice literature, we argue that markets impede equity and fairness. Markets express the antiquated values baked into the initial distribution of property rights, with lasting consequences for justice today. Markets also displace the participatory governance environmental justice requires.

Third, applying commons literature to water markets, we conclude that markets impede reinvigorated water governance by both decreasing

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